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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

CHERIE C.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G033519

(Super. Ct. Nos. J-435214,
DP001817)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Carolyn Kirkwood, Judge. Petition denied.

Deborah A. Kwast, Public Defender; James Steinberg, Assistant Public Defender, and Paul T. DeQuattro, Deputy Public Defender, for Petitioner.

Benjamin P. de Mayo, County Counsel, and Ward Brady, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Susan Ann Barry for Minor Kayla M.

Lawrence A. Aufill for Minor John O.

* * *

Cherie C.'s children, John O. and Kayla M., were removed from her custody and placed in long-term foster care. At a periodic review hearing, the juvenile court referred the case to a permanency hearing under Welfare and Institutions Code section 366.26.¹ Cherie C. petitions for extraordinary relief from that order (Cal. Rules of Court, rule 39.1B), contending the children were not the proper subjects of adoption. She also contends the juvenile court acted in excess of its jurisdiction by removing the children's psychologist from the case. We find no error and deny the petition.

FACTS

John, now 10, and Kayla, now 9, have been removed from their mother's custody twice. In February 1996, they were removed in Alameda County because their biological father was physically abusing both of them. They were returned to the mother in December 1998, after she received 18 months of reunification services. In October 1999, the children were removed in Orange County because the mother had remarried and their stepfather was physically abusing them. The mother participated in an additional 18 months of reunification services, which were terminated at the 18-month review hearing in July 2001. At that hearing, the juvenile court ordered the children to remain in long-term foster care because they were not adoptable and there was no one willing to accept legal guardianship.

When reunification services were terminated, the children were living together in a group home, where they received intensive therapy. Kayla exhibited "extreme sexualized behaviors," and "had several instances of defecating and urinating inappropriately" John had been suspended from his first grade class more than once due to his disruptive behavior, and he spent part of each day in a special education class. John's therapy focused on improving his self-esteem and anger communication skills. He was on a "behavioral contract to keep a five feet distance from Kayla due to

¹ All statutory references are to the Welfare and Institutions Code.

inappropriate physical and sexual boundary issues.” Both children were medicated for enuresis and attention deficit hyperactivity disorder.

By January 2002, Kayla had been moved to a separate group home, which improved the sibling relationship. Kayla’s sexualized behavior had diminished, and her behavior at school was acceptable. John’s school behavior was likewise acceptable. But both children continued “to require the intense therapeutic environment that they are currently receiving.” The mother visited three times a week, and the children enjoyed the visits. They were disappointed, however, when she failed to show up, which she did “approximately . . . one out of every six visits.” The mother later explained she had gotten a new job that required her to work on Saturdays, and the social worker changed that visit to Fridays. The juvenile court ordered the children to remain in long-term foster care.

At the review hearing in June 2002, SSA reported that both children had been moved to new, smaller group homes. Kayla adjusted fairly well, but John exhibited oppositional and aggressive behaviors. Both children continued intensive therapy, and John received psychotropic medications. The mother visited weekly, with occasional overnights. Her visits were consistent and enjoyable. An adoptability assessment performed in April 2002 concluded adoption was undesirable because the children were placed in residential facilities “and continuation of parental rights will not prevent finding the children a permanent family placement if the [mother] cannot resume custody when residential care is no longer needed.” Furthermore, the social worker felt the children’s relationship with their mother outweighed the benefits of adoption. The juvenile court ordered the children to remain in long-term foster care.

By December 2002, John had received a change in psychiatrists and in medication, which improved his adjustment. He had also been placed in a specialized school, resulting in “good” schoolwork and no “extreme behavior difficulties.” Kayla’s behavior and academic performance were satisfactory. Both children continued therapy

and medication. The mother's visits had been increased to eight hours unmonitored every other week and an overnight visit on alternate weekends. This arrangement continued until October 2002, when the social worker discovered the mother was bringing a man named "Jeff" to the visits. Overnight visits were suspended, but the mother persisted in bringing Jeff to the eight-hour visits. Consequently, the social worker changed the visits to two hours, monitored, per week. Kayla told the social worker she knew it was wrong for the mother to have a man present during the visits, but the mother had explained she did not like to be lonely.

At the periodic review hearing in May 2003, the juvenile court found the children still were not proper subjects for adoption and ordered them to remain in foster care. However, it ordered SSA to refer them for placement in foster homes rather than group homes. In July, SSA placed Kayla in the concurrent planning home of Michael and Julian M., and in August, John began visiting with a prospective adoptive parent, Kim T.

In its report prepared for the periodic review hearing set for November 2003, SSA opined that the permanent plan of long-term foster care was no longer appropriate for the children and recommended the setting of a hearing to select another permanent plan under section 366.26. SSA reported that both children were considered adoptable but hard to place. John was described as "an older child with moderate to severe behavior problems, he resides in a group home, is prescribed psychotropic medication and enrolled in a non-public school for children with moderate to severe behavior problems. Lastly, he attends a daily after-school therapeutic treatment program to address those particular behaviors." Kayla had special needs similar to John, but she had already adjusted well to her new placement. After being placed in the M's home for three months, Kayla wanted them to adopt her, and the M.'s likewise wanted "to move forward [with] the adoption." Both children wanted to maintain contact with their mother after being adopted, if possible.

The mother filed a petition under section 388 seeking the return of the children to her care; a hearing on the petition was denied. John was placed in Kim T.'s home in October, but after two months, he was returned to Orangewood Children's Home because "the foster parent was unwilling to cope with physical and verbal aggression on the child's part."

The review hearing was continued to January 2004. Dr. Marsha Hewlitt had been ordered by the juvenile court to conduct a bonding study of the children and their mother, and her findings were admitted into evidence. She concluded "[b]oth children have significant emotional, behavioral and education challenges that require ongoing therapeutic intervention and support services." They were emotionally attached to their mother and to each other, although "[a]n emotionally attached, meaningful or bonded relationship does not mean the relationship is positive and/or healthy. However, the children and their mother perceive themselves as a family and to completely sever all contact between them would be detrimental at this age and stage of the children's development." The children both wanted to be adopted, but not if it meant losing contact with their mother or each other.

The social worker testified she had been involved with the case for three and one-half years. She observed visits between the mother and the children and opined their relationship was very good. Kayla's foster parents wanted to adopt her. They did not want John placed with them because they were afraid it would jeopardize Kayla's placement, but they intended to facilitate continued contact between Kayla and John, as well as between her and her biological mother.

Kayla testified she enjoyed spending time with her mother and with John; she would like to spend more time with her mother. She liked living with the M. family and would "probably" like to be adopted by them because "it's a good place for me"; but she really wanted to be adopted by "Cindy, my therapist. For every Thursday." She admitted she really did not care where she lived. John wanted to be adopted by Kayla's

foster parents, although he did not really know them. Otherwise, he would like to be adopted by his friend Hunter's parents even though he had never met them. He testified repeatedly he wanted to live with Kayla, and he agreed that living with his mother and Kayla as a family again would be a good thing "so that . . . I don't have to be adopted ever again, and I can be with my mom and my sister, and I could be living — happy again."

Dr. Stephanie Silva was the mother's therapist for four years. She testified the mother had improved significantly during her course of treatment, but recently, the mother had terminated the relationship. Silva discovered the mother had received a citation for driving under the influence of alcohol in May 2000 and had concealed it from her and the social worker. Silva began exploring the mother's drinking habits in therapy and concluded the mother was an alcoholic. The mother did not want to give up drinking and did not see it as an obstacle to parenting her children. She refused to follow Silva's recommendation to participate in drug and alcohol abuse programs.

Dr. Amanda Clinton, a psychologist, also testified. She worked for the Continuing Care and Placement Unit of the Orange County Health Care Agency, which "provides case management and consultation for children and their families who are in the dependency system." She was assigned John and Kayla's case in November 2001. The social worker asked Clinton to meet with the mother to assess her problem solving abilities "and the way in which they may impact her ability to care for her children," which she did in August 2002. Clinton was impressed with the mother's abilities. She met with the mother and the children in October 2002 and May 2003 and concluded their relationship was very strong. She and the mother spoke on the telephone approximately twice a month about the children's education and mental health needs. In July 2003, Clinton wrote a letter in support of the mother's section 388 petition in which she emphasized the mother's participation in her children's lives and their strong attachment to her.

After the mother told Silva about the citation for driving under the influence, the mother contacted Clinton “and indicated that she was concerned that her therapist was violating her rights as a client” by telling the social worker about her alcohol use. Clinton advised the mother of her privacy rights, and the mother subsequently revoked her waiver of consent allowing Silva to share information about her case. Disagreeing with the suggestion that she was an advocate for the mother, Clinton characterized herself “as an advocate for the children and their mental health needs.” Her objective in writing the letter “was to highlight the strengths that I have observed in [the mother].” She believed “that recognizing her strengths and abilities is indicated – as being in the best interests of the children’s mental health. [¶] . . . [¶] . . . The children do have a positive relationship with their mother. And . . . given the difficulties that the children could have if their relationship with their mother were severed, then it was critical that these issues were considered [by] those who are decision makers in the placement process.” Although Clinton considered the children to be her clients, she had not had contact with Kayla during the last six months, and she had seen John only once, when she was “asked by social services to be present when he said goodbye to his former foster father.”

Clinton and her supervisor wrote a memo to the director of the Health Care Agency in December 2003 “to briefly outline some differences between SSA and HCA, assessment of the mental health needs of the above-mentioned children.” Clinton testified the differences were “the perception of [the mother’s] strengths” and “her ability to parent her children.” Clinton saw no conflict between supporting the mother, which the social worker had asked her to do, and protecting the mental health of the children” because the needs of the mother and the children did not conflict. If she had found the respective needs were “opposite,” she would have discussed it with her supervisor.

Counsel for both Kayla and John asked the juvenile court to remove Clinton from the case because she was not looking out for the children’s best interests.

While the children “want to be in a permanent home,” Dr. Clinton “clearly is in bed with the mother and wants what the mother wants.”

The juvenile court found the permanent plan of long-term foster care that was ordered in July 2001 was no longer appropriate, and there was “no compelling reason for determining that a .26 hearing is not in the best interest of the child[ren].” It found Dr. Clinton was working on the case as an advocate for the mother and was biased on the mother’s behalf. She “was not straightforward in her answers. Her testimony was punctuated by long pauses and often nonresponsive and gratuitous offerings.” Because Dr. Clinton had not been operating as an advocate for the children, the juvenile court ordered that she be removed as the case management coordinator for John and Kayla.

DISCUSSION

Setting a hearing to select a new permanent plan was not an abuse of discretion.

When a child has been placed in long-term foster care, the juvenile court is required to review his or her status every six months to consider all permanency planning options. (§ 366.3, subd. (d).) After it conducts the review, “[t]he court shall order that a hearing be held pursuant to Section 366.26 unless it determines by clear and convincing evidence, that there is a compelling reason for determining that [such] a hearing . . . is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship.” (§ 366.3, subd. (g).) If the county agency determines it is unlikely that the child will be adopted or one of the exceptions to the termination of parental rights applies (§ 366.26, subd. (c)(1)(A)-(E)), “that fact shall constitute a compelling reason for purposes of this subdivision.” (§ 366.3, subd. (g).) If the juvenile court finds a compelling reason that a section 366.26 hearing would not be in the best interest of the child, it “may . . . order that the child remain in foster care, without holding a hearing pursuant to Section 366.26.” (*Ibid.*)

Thus, the statute does not *require* the juvenile court to bypass the section 366.26 hearing; it merely *allows* it to do so if it makes the requisite preliminary finding that such a hearing would not be in the best interest of the child. “The Legislature plainly gave the court the discretion, but never an obligation, to dispense with a .26 hearing. . . . Such a hearing could never be dispensed with unless the particular bench officer presiding over the case were convinced an additional hearing to consider placement options could not affect his or her determination that long-term foster care is the only viable option. . . . [T]hat court alone is in the unique position of knowing whether it is prepared to reject the two preferred permanent options, adoption and guardianship, without a .26 hearing.” (*Victoria S. v. Superior Court* (May 12, 2004, G033652) ____ Cal.App.4th ____ [2004WL 1066354].)

The juvenile court here found there was no compelling reason to bypass the section 366.26 hearing, which the mother attacks as erroneous. She argues the children clearly were not the proper subject of adoption, pointing to their ages, their bonds with her and each other, and their history of behavior difficulties. We need not examine the evidentiary underpinnings of the court’s finding, however, because it had the discretion to order a section 366.26 hearing even if there were a compelling reason to bypass it. Such an order does not prejudice the mother. At the section 366.26 hearing, the juvenile court will revisit all the evidence bearing on the adoptability of the children and the strength and nature of their bonds with their mother and each other. “[T]he juvenile court’s decision to schedule a .26 hearing does not in any way rule out the possibility long-term foster care will be the ultimate disposition” (*Victoria S. v. Superior Court, supra*, ____ Cal.App.4th ____.)

The removal of Dr. Clinton was not error.

The mother contends the juvenile court exceeded its jurisdiction by ordering the removal of Dr. Clinton as the CCPU case management coordinator for John and Kayla. She argues the order is an improper exercise of an executive function by a

judicial officer, thus violating the separation of powers doctrine in the California Constitution. (Cal. Const., art. III, § 3.)

The mother cites *In re Ashley M.* (2003) 114 Cal.App.4th 1 in support. There, the juvenile court directed that a particular social worker remain on the case of a dependent child and be given case management responsibilities. It ordered, ““All social studies reports and recommendations to the Court should reflect Barbara Byrne’s own professional opinions; however, any contrary opinions held by [the agency] management should also be reported to the Court.”” (*Id.* at p. 6.) The agency objected to the order as a violation of the separation of powers doctrine and appealed. (*Ibid.*)

The court found, “The county’s social services agency plays a ‘hybrid’ role in dependency proceedings, exercising both executive and judicial functions.” When providing child welfare services, the agency acts “as an administrative agency of the executive branch [of state government], subject to supervision by the State Department of Social Services.” (*In re Ashley M., supra*, 114 Cal.App.4th at p. 7.) When providing social study reports and other essential information to the juvenile court, however, the agency “acts as an impartial arm of the court in assisting the court to carry out the Juvenile Court Law.” (*Id.* at pp. 7-8.) Acknowledging that the juvenile court had made the order “to assure that [it] received accurate information,” the court held “the determination of how best to assign duties to employees and otherwise allocate the agency’s resources is not a judicial function and must be left to the agency’s own discretion.” (*Id.* at pp. 8-9.)

The mother also cites *In re Walter E.* (1992) 13 Cal.App.4th 125, where the juvenile court ordered the social services agency to obtain the services of an expert to evaluate the child and delegated the selection of that expert to the agency. The parents sought the appointment of a psychologist of their choice, claiming the one selected by the agency was biased against them. Their request was denied. On appeal, the mother challenged the delegation, and the court affirmed. “[T]he selection of the identity of the

clinical experts ‘as may be required to assist in determining the appropriate treatment of the minor and as may be required in the conduct or implementation of such treatment’ (§ 370) is not primarily a judicial function, it does not involve the declaration of law or the determination of the rights of the parties to a controversy before the court. [Citation.] The exercise of this function is instead clearly incidental or subsidiary to a function or power otherwise properly vested in the Department; namely, the administration of laws and procedures dealing with dependent children in general, and the provision of appropriate therapeutic treatment for such dependent children in particular.” (*Id.* at p. 136.)

The case before us differs from those cited in several important respects. First, Dr. Clinton is the employee of the Orange County Health Care Agency, not SSA, and she was assigned to the case by her employer. The record gives us no information about SSA’s right or obligation, if any, to choose or supervise employees of the Health Care Agency who are assigned to dependency cases. Second, if SSA has any control over the removal or retention of Dr. Clinton, it did not object to her removal below nor does it object on appeal.

Third, Dr. Clinton’s role was an advocate on behalf of the minors, and her removal was requested by the attorneys for the minors, not the attorney for the mother or SSA. Trial counsel for a dependent minor “shall be an advocate for the protection, safety, and physical and emotional well-being of the child.” (§ 317, subd. (c).) In representing the child’s interests, trial counsel shall investigate the facts, present and cross-examine witnesses, “and participate further in the proceedings to the degree necessary to adequately represent the child.” (§ 317, subd. (e).) Although counsel must advise the juvenile court of the child’s wishes, he or she “shall not advocate for the return of the child [to the parent] if . . . that return conflicts with the protection and safety of the child.” (*Ibid.*) If minors’ counsel perceived an injustice on behalf of their clients, they had nowhere to turn for a remedy but to the juvenile court.

The juvenile court has the power to “control all proceedings during the hearings with a view to . . . the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought.” (§ 350, subd. (a)(1).) The juvenile court here found Dr. Clinton was biased in favor of the mother and working against the interests of the children. Ordering her removal was within its power to ensure it would receive relevant and credible information about the children’s well-being.

DISPOSITION

The petition for writ of mandate is denied.

SILLS, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.